

Department of Permits and Development Management
111 West Chesapeake Avenue
Towson, Maryland 21204
Baltimore County, Maryland

In the Matter of

Civil Citation No. 71757

5648 Southwestern Boulevard LLC
351 West Camden Street
Baltimore MD 21201

5648 Southwestern Boulevard

Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FINAL ORDER OF THE CODE ENFORCEMENT HEARING OFFICER

This matter came before the Baltimore County Code Enforcement Hearing Officer on February 24, 2010 for a Hearing on a citation for violations under the Baltimore County Zoning Regulations (BCZR) section 4B-101A, 4B-102, 102.1, 230, failure to cease operation of an adult entertainment business: adult entertainment and business, adult movie theatre, adult store, display devices of sexual content, sexual activities in a BL zone on residential property known as 5648 Southwestern Boulevard, 21227.

On December 21, 2009, pursuant to Baltimore County Code (BCC) §3-6-205, Inspector Mark Gawel issued a Code Enforcement & Inspections Citation. The citation was sent to the Respondent by 1st class mail to the last known address listed in the Maryland State Tax Assessment files.

The citation proposed a civil penalty of \$616,800.00 (six hundred and sixteen thousand eight hundred dollars).

The following persons appeared for the Hearing and spoke on the record or testified: Howard J. Schulman, Esquire, of Schulman & Kaufman, LLC, representing Respondent; Paul Mayhew, Esquire, representing Baltimore County; Jeffrey Perlow, Land Use Planner in Baltimore County Zoning Review Office, Mark Gawel, Baltimore County Code Enforcement Officer, Chip Raynor, Baltimore County Code Enforcement Officer, Michael McAuliffe, President of the Halethorpe Improvement Association, Stephen Whisler, Past President, Coalition for the Preservation of Southwest Baltimore County and Louis Brocato, Membership Chairman for the Wynnewood Community.

In attendance: Howard Hirsch, represented by attorney Schulman; also recorded in attendance, Oscar Connally, Michael McAuliffe, Maria McAuliffe, James Klein, W. Carter, Carla Carr, Louis Brocato, John Roth, Lucille Roth, Tom Quirk, Sister Kathleen Moore, Joseph Kinsey, Helen Kinsey, Michael Nicholson, John Lanahan, Denise Moran, John Simms, Richard Parsons, Bryan Sheppard and Jay R. Thompson.

After proper consideration of all the evidence and testimony presented, the Hearing Officer finds:

A. This Citation was issued without prior Correction Notice pursuant to the Department's adopted criteria, for a violation that involves prostitution, the display of obscene material or sexual activities as defined in Section 4B-101 of the Baltimore County Zoning Regulations. BCC Section 3-6-205.

B. At this Hearing, Respondent's attorney, Mr. Howard Schulman, Esq., objected to the enforcement of this Citation. His first objection was that BCC 21-2-101, the County's statute regulating adult entertainment businesses, is vague and overly broad and would apply to many library books and ordinary drugstore items. His second objection was that enforcement would violate his client's rights, under both the First Amendment to the United States Constitution and also under Article 40 of the Maryland Declaration of Rights, because there are not alternative avenues of expression and locations available within the County to operate his client's business. Baltimore County's attorney, Assistant County Attorney Paul Mayhew, responded that *res judicata* bars Respondent's challenge of the County's statute because the federal courts have already upheld the County's statute in a case brought by Respondent. This Hearing Officer stated that Mr. Schulman could file a brief supporting his objections within a week of this Hearing; Mr. Mayhew stated that he would file a response brief within five working days after receipt of Respondent's brief.

C.1. At this Hearing, Mr. Schulman claimed that the County's ordinance is impermissibly vague, in violation of the First Amendment. In his written brief, Mr. Schulman also argues that Baltimore County's ordinance is "overly broad and thereby unconstitutional." He focuses on the phrase "relating to sexual activities" and argues that this term encompasses such things as mainstream literature, dance, romantic videos, and medical textbooks and therefore makes the ordinance overly broad. However, these challenges are without merit; and these challenges are barred by res judicata

because Respondent and others previously brought an as-applied challenge to Baltimore County's ordinance in the Allno litigation, and the District Court and the Court of Appeals upheld the ordinance.

C.2. In the Allno case, in which Respondent was one of the plaintiffs, Judge Smalkin specifically addressed these claims and granted summary judgment to Baltimore County. Allno Enterprises, Inc. v. Baltimore County, Md., Civil Action No. S-99-1249, Memorandum Opinion and Order, February 2, 2000 (Smalkin, J.) (incorporating Civil Action No. S-99-1496, Southwest Enterprises, Inc., and Civil Action No. S-99-1498, Love Ones Lingerie & Gift Shop, Inc.) Judge Smalkin's opinion states,

"Plaintiffs allege that the Ordinance is vague, overly broad, and grants too much discretion to the inspectors in determining if there is a violation. See Complaint, paragraph 10. To the extent that this argument is part of the prior restraint allegation, it is discussed above. Otherwise, the argument is without merit. The definitions used in the Ordinance are sufficiently specific to describe which businesses and conduct are covered. See City of Renton, 475 U.S. at 55, n.4; Young v. American Mini-Theaters, 427 U.S. 50,53 (1976); Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821, 833 (4th Cir. 1979); 5297 Pulaski Highway, Inc. v. Town of Perryville, 69 Md. App. 590, 600, 519 A.2d 206, 211 (Md. Ct. Spec. App. 1987)."

Allno, op. cit., page 22-23 (February 2, 2000). In his Order and Final Judgment in the Allno case, which was affirmed on appeal by the U.S Court of Appeals for the Fourth Circuit, Judge Smalkin ordered that Baltimore County's "Motion for Summary Judgment BE, and it hereby IS, GRANTED as to the Plaintiff's claim that the Baltimore County Ordinance is overly-broad or void for vagueness." Allno, op.cit., Order p. 1 (June 13, 2000), *affirmed*, 10 Fed. Appx. 197, 2001 WL 589423 (C.A. 4 (Md)). Respondent and Baltimore County have thus already litigated these issues, and this Hearing Officer is entitled to rely on the federal court rulings that upheld the County's ordinance.

C.3. In his written brief, to support the claim that the ordinance is overly broad, Respondent's attorney cites Giovani Carandola, Ltd. V. Basson, 303 F.3d 507, 513 (4th Cir. 2002). This case was decided after Judge Smalkin's disposition of the Allno case. In Carandola, the Court of Appeals for the Fourth Circuit applied the overbreadth doctrine to uphold a District Court preliminary injunction barring enforcement of a local ordinance that restricted and regulated nudity and other conduct in all establishments holding permits to sell alcoholic beverages. The Court of Appeals found the District Court had not abused its discretion in finding that Carandola would likely prevail on its overbreadth challenge, because the ordinance required the issuance of 50,000 permits; only a small percentage of

permittees presented the kind of adult entertainment that legitimately concerns the state; and the defendant Commission had conceded that the vast majority of permittees, including coliseums, theaters, hotels and restaurants, only presented mainstream entertainment and nevertheless were burdened by the ordinance. Review of the Carandola decision reveals no useful factual parallel with the current case.

C.4. The applicable standards for First Amendment compliance are clearly stated by the Supreme Court in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) and Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). Regarding Respondent's claim that Baltimore County's ordinance is overly broad, the United States Supreme Court addressed and rejected a similar challenge in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), in a case involving Detroit's zoning ordinances regulating adult theaters, and stated, "if the statute's deterrent effect on legitimate expression is not 'both real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts,' ... the litigant is not permitted to assert the rights of third parties." 427 U.S. at 60. In that case, the Supreme Court concluded, "We are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment." Id. In the same case, the United States Supreme Court found that the local ordinances at issue were not too vague because "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents. ...Neither respondent has alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater." 427 U.S. at 58-59. Here, similarly, it is clear that the County's Adult Entertainment Businesses zoning ordinance applies to Respondent, as the uncontested facts show that Respondent offers for sale and displays for viewing items covered by the ordinance. It is also clear to this Hearing Officer, and was clearly found by the courts in the Allno litigation, that the ordinance is narrowly focused on a small number of adult entertainment businesses and regulates the placement of those businesses in order to address legitimate and substantial governmental interests in the limiting the secondary effects of adult theaters on the surrounding community. This Hearing Officer therefore concurs with the findings and conclusions reached by the District Court and the Court of Appeals in the Allno court decisions, and finds that the County's zoning ordinance does not violate the First Amendment to the Constitution by being impermissibly vague or overbroad.

D.1. In his written brief, Mr. Schulman challenges the constitutionality of the County's ordinance regulating adult businesses under the First Amendment to the federal Constitution and also under the Maryland Declaration of Rights, asserting that "[I]n order for the County's ordinance to pass constitutional muster, the County must provide alternative avenues of communication in the form of a reasonable amount of potential locations within the County for what the County designates as an adult entertainment business." He further complains that "[h]ere, the County has made no effort to point to any alternative locations given that the Respondent has called the ordinance into question on this very ground." However, Mr. Schulman's First Amendment challenge is without merit because the federal courts have already evaluated it, and have upheld Baltimore County's ordinance as applied to Respondent. The United States Court of Appeals for the Fourth Circuit upheld the District Court's grant of summary judgment to Baltimore County in the Allno Enterprises case, in which Respondent was one of the plaintiffs. Allno Enterprises, Inc. v. Baltimore County, 10 Fed. Appx. 197, 2001 WL 589423 (4th Cir. 2001). In Allno, the Court of Appeals reviewed factual evidence about available parcels in MH zones, and ruled, "we conclude that there are at least eleven available sites." 10 Fed Appx. at 203. The Court specifically found that "there exists an adequate number of sites" in MH zones to which adult businesses can relocate, "and hence, adequate alternative avenues of communication." Id. at 202. The Allno case was argued on appeal in April 2001 and the Court's opinion was issued in June 2001. In the current case, because Respondent has not made a factual showing that the number of available parcels has materially changed since 2001, it is reasonable for this Hearing Officer to rely on the findings and conclusions of the federal Court of Appeals in Allno, to apply the doctrines of res judicata and collateral estoppel, and to apply Baltimore County's ordinance in this code enforcement proceeding.

D.2. With regard to Respondent's claims under Article 40 of the Maryland Declaration of Rights, Mr. Schulman correctly asserts that the Allno decision did not encompass an interpretation of this provision of Maryland law. However, in a different case involving adult bookstores, the Maryland Court of Special Appeals has recently ruled that "because Article 40 of the Maryland Declaration of Rights is '*in pari materia*' with the First Amendment' and, thus, the 'legal effect' of both provisions 'is substantially the same,' Sigma Delta Chi v. Speaker, 270 Md. 1, 4 (1973) we shall consider appellant's two contentions -- that the Ordinance violates Article 40 and the First Amendment -- as a single claim." 104 West Washington Street II Corp. v. City of Hagerstown, 173 Md. App. 553, 567, 920 A.2d 482, 489 (2007). This clear ruling by the Maryland Court of Special Appeals provides ample basis for this Hearing Officer to treat Respondent's two contentions as a single claim and to find that because it does

not violate the First Amendment to the federal Constitution, Baltimore County's ordinance also does not violate Article 40 of the Maryland Declaration of Rights.

E. This Citation charges Respondent with failure to cease operation of an Adult Entertainment Business in a B.L. Zone. Jeffrey Perlow, a Land Use Planner in the Zoning office of the Baltimore County Department of Permits and Development Management, testified that his office reviews permit applications and development concept plans for compliance with County zoning regulations. He testified that he reviewed the zoning for 5648 Southwestern Boulevard, and determined that the applicable zone is B.L., Business Local. Mr. Perlow further testified that B.L. is the lowest of the three commercial zones, and that permitted uses include light commercial, mercantile, and retail uses. Mr. Perlow further testified that he is familiar with Baltimore County's Adult Entertainment Business law, and testified that BCZR Article 4B prohibits the operation of an adult store or movie theater in a B.L. Zone.

F. Code Enforcement Inspector Mark Gawel testified that he issued this Citation on December 21, 2009 after inspecting the property. He testified that he used July 12, 2001 as the starting date for the code violations because in 2001 he had inspected the property and found it in the same condition with the same violations. He testified that code enforcement was put on hold in 2001 because of all the appeals of court cases. He testified that he found 8 or 9 video display devices in use at the premises in 2001, and found 16 in 2009. He testified that he calculated the square footage of floor space devoted to adult items in 2001 and in 2009. He testified that he also inspected the property after his 2001 inspection and that it was probably in 2002 but he does not know the exact date.

G. Code Enforcement Inspector Chip Raynor testified that he inspected the premises on December 21, 2009 and has returned several times since then to re-inspect. He testified that recent inspections have found that some paperback books and cards have been added to the merchandise stock on display. Inspector Raynor further testified that he used a tape measure to prepare a drawing showing the interior of the building and to calculate the square footage of areas used for merchandise and customer service. The drawing is marked as County Exhibit 3.

H. Inspector Raynor identified photographs in the file showing the interior areas of the building, marked as County Exhibit 4, and testified that he took these photographs on February 18, 2010. The picture on page 1 of County Exhibit 4 ("picture #1") and picture #2 show greeting cards on

racks. He testified that the paperback books in picture #3 and picture #4 were recently added. The paperback books appear to be mass market paperbacks including romance novels, and a sign above the rack says "paperback books .49 each." He testified that the videos displayed in picture #5 are pornographic videos that are considered adult store materials under County law. Picture #6 shows similar videos with a sign "Amateur." He testified that on the drawing, the dotted line down the aisle shows where he separated adult from non adult materials when calculating the square footage devoted to each category. He testified that picture #7 shows the "Shemale" category of movies, with a sign on the wall identifying the category; picture #8 shows the "Big Boobs" category of movies; picture #9 shows stockings for sale which were not counted in his calculations as adult materials. The areas counted as adult materials are marked as Area A and Area B. Inspector Raynor identified picture #10 and picture #11 in Exhibit 4 as showing adult toys offered for sale, and testified that these are located in Area B on his drawing of the store. Inspector Raynor testified that some other photographs in County Exhibit 4 show materials offered for sale including beads and lotions, and that he did not count those as adult materials for the purpose of calculating the square footage used for adult materials.

I. Inspector Raynor further testified that he observed video booths in the rear of the store. He counted 16 video machines, each approximately four feet by five feet in size. They are portable. There are eight video machines in the 10 foot by 25 foot room in the front of the store, and another eight machines in the large rear area. Six of the machines in the rear are in a large room that also contains a change token machine. He testified that the light in the room was very low and he did not see anything else in the room.

J. Photographs in County Exhibit 4 show two large signs that read, "VIDEO VIEWING ROOM – SOUND & COLOR" (picture #31, picture #33). Photographs also show video machines including screens, electronic display showing selection number, number of credits, volume control, and a button to "push for selection"; display screens showing video covers with naked women in pornographic poses and the channel number identified for selection; and the label "Hot New Videos Weekly." Another photograph shows a sign that reads, "Booth Instructions, adjust volume to desired level, please keep booth clean for the next person, thank you for visiting 'Southwest Blvd Bookstore' for your viewing pleasure." Picture #45. Another photograph shows a sign that reads, "Southwest BLVD Bookstore, Open 24/7, 3 Sets of Buddy Booths, 32 Video Selections, Accepts Tokens Only." Picture #47. Another photograph shows a sign that reads, "View up to 32 different videos by pressing the selector button." Picture #48.

K. Inspector Raynor testified that he inspected a “buddy booth” in the rear of the store. He testified that the purpose of this booth is for two people in separate booths to view the same video at the same time. He testified that picture #44 in Exhibit 4 shows this “buddy booth” and that it shows two holes that have been cut through the panel dividing the booths. There is a large hole and a small hole. He testified that based on his knowledge and experience, these holes are probably there to permit two persons to have a sexual experience.

L. Inspector Raynor testified that he calculated the square footage devoted to adult materials using the information shown in County Exhibit 3. The store interior is 1672 square feet. Twenty percent of the store area is 334 square feet. He testified that calculating the square footage devoted to the adult video and adult toy areas, he found that Area A and Area B total 386 square feet. He testified that he subtracted the bathroom area and found that 710 square feet of the store’s area is devoted to the video machines. Alternatively, calculating the size of each booth at 20 square feet per booth, he calculated that the 16 video display devices take up 320 square feet of space. He testified that he counted the 16 foot aisles because they are used to display and view merchandise, and a person cannot walk down the aisles in the adult material areas without seeing the adult materials.

M. Michael McAuliffe is President of the Halethorpe Improvement Association. He testified that he did research on the Internet to get a better understanding of the activities being carried on at this store. He testified that he found an explanation in a Wikipedia item for the holes shown in County Exhibit 4, Picture #44, that this is called a “glory hole” and that they are used for sexual contact between occupants of buddy booths. He further testified that he visited the store on December 13, 2009 and took pictures, and provided those pictures to the County code enforcement office. His photos, which are in the file, show adult videos and products. He further testified that he observed used condoms all over the booth floors and in trash cans. He further testified that he did research on the Internet to find out how “buddy booths” work. He testified that based on his research, a partition separates the two booths and a light turns on to alert a viewer that the next door viewer wants to be his buddy. The other person can put a token into the machine and see the same video, and a 2 foot by 2 foot glass window that is normally foggy will clear, and the viewers can view each other. He further testified that a hole is often drilled through the partition at the pelvic area level to permit contact between the booths.

N. Mr. McAuliffe further testified that he found a magazine with a full page advertisement for "Lovecraft" adult entertainment stores, and he brought the advertisement to this Hearing. The advertisement lists thirteen store locations, including 5648 Southwestern Boulevard, and notes that "All Locations are Individually Owned And Non-Affiliated." The advertisement lists available merchandise including adult novelties, adult Video/DVD sales, and "DVD & Video Viewing Booths." The advertisement further states at the bottom in big lettering, "Visit Us online at www.lovecraftstore.com." Mr. McAuliffe further testified that he visited this website and that it shows only adult material and requires viewers to certify they are over 18 years old before accessing the website. Mr. McAuliffe further testified that he searched on the Internet and found numerous items posted on Craig's List and on other websites with men soliciting other men to meet them at Southwest Video for sexual acts. He provided copies of some of these postings.

O. Mr. McAuliffe further testified that he brought a petition signed by numerous neighbors requesting that Baltimore County's Code Enforcement department bring Southwest Video into compliance with the law. The petition, which is in the file, has approximately 470 signatures. Mr. McAuliffe also submitted letters from six community leaders, including local church pastors and school principals, expressing concerns and objections to the presence of the adult entertainment business being operated by Southwestern Video and expressing support for the Halethorpe Improvement Association's testimony at this Hearing.

P. A brief recess was called to permit Respondent's counsel, Mr. Schulman, to review all the exhibits being provided by Mr. McAuliffe. When the Hearing reconvened, Mr. Schulman stated that he believes much of the material provided by Mr. McAuliffe is not pertinent to this case, and questioned its accuracy. He further noted that some material appears to have been obtained after the date of this Citation. Mr. Schulman asked Mr. McAuliffe questions about the area across the street from Southwest Video, and Mr. McAuliffe responded that there is a MARC train station parking lot. There is no station, just a grade level stop and a couple of benches. The parking lot has capacity for about 700 cars. There is an overpass nearby for Francis Avenue, which connects Arbutus to Halethorpe. There is a stream behind this property, called Herbert Run.

Q. Mr. McAuliffe asked neighbors in attendance at this Hearing to raise their hands if they agreed with his testimony, and 19 hands were raised. Steven Whisler testified on behalf of the Coalition for the Preservation of Southwest Baltimore County and requested that the County ensure Southwest Video complies with County zoning requirements. Lewis Brocato testified on behalf of the Wynnewood Community Association and stated that his group strongly supports the County's position in this case.

R. Assistant County Attorney Mayhew stated a correction for the record, that Inspector Gawel and Inspector Raynor visited and inspected the premises on December 18, 2009, not on December 21 as stated by Inspector Raynor (see paragraph G, above).

S. Respondent did not present any witnesses or submit any evidence at this Hearing. Mr. Schulman stated that his client would submit on the record, and renewed his legal arguments against enforcement of this Citation. Assistant County Attorney Mayhew argued that the Citation should be enforced because the County has proven a clear violation of zoning regulations, as Respondent is unlawfully operating an Adult Entertainment Business, with prohibited video display devices and with too much square footage devoted to adult material, in a B.L. Zone. He requested that the business be shut down. Mr. Schulman argued that even if a violation is found, sanctions could only properly be applied from December 18, 2009 and that the business cannot properly be shut down.

T.1. Review of the testimony and evidence clearly shows that Respondent is operating an Adult Entertainment Business in a B.L. zone in violation of Baltimore County's Zoning Regulations, by operating both an Adult Movie Theater and an Adult Store at this location.

T.2. Adult Movie Theater: The sixteen video viewing booths observed in the store constitute "display devices" as defined in the zoning regulations, BCZR Section 4B-101 ("Display Device – An electronically or mechanically controlled still or motion-picture machine, film projector, videotape player or other image-producing device that may be activated directly or indirectly by viewers or at the request of viewers for which a fee is charged.") An Adult Movie Theater is defined as "A business establishment open to the public, or to members, that maintains display devices for viewing on the premises files, videos or other viewable material, if a substantial portion of the stock or trade is characterized by an emphasis on matters depicting, describing or relating to sexual activities." BCZR Section 4B-101. Here, the evidence shows clearly that the video booths offer only films featuring

sexual activities for viewing by patrons on the premises. Inspector Gawel observed 8 or 9 video booths in 2001, and no evidence was presented by Respondent to contest the County's assertion that video display devices to show videos depicting sexual activities have been in operation from 2001 through 2009. Thus the evidence shows that Respondent is operating an Adult Movie Theater, which is classified in the zoning regulations as an Adult Entertainment Business, and further shows that Respondent has operated an Adult Movie Theater at this property since 2001. Such a business can only be located in an M.H. Zone. BCZR Section 4B-102. This portion of the Citation will be enforced.

T.3. Adult Store: the uncontested evidence presented shows that in February 2010 the square footage of the store devoted to displaying "matters or devices depicting, describing or relating to sexual activities," namely the adult videos and adult sex toys, totaled 386 square feet, which exceeds twenty percent of the store area (334 square feet). An even greater percentage of the store's area was devoted to adult videos and adult sex toys when this Citation was issued in December 2009, according to testimony from Inspector Raynor, who stated that non-adult paperback books had been added to the store's stock between December 2009 and February 2010. Under the zoning regulations, exceeding the 20% limit puts this store into the definition of "Adult Store," namely "A business establishment open to the public, or to members, that offers for sale or rental any printed, recorded, photographed, filmed or otherwise viewable material, or any sexually oriented paraphernalia or aid, if a substantial portion of the stock or trade is characterized by an emphasis on matters depicting, describing or relating to sexual activities." BCZR Section 4B-101. Thus it is apparent that Respondent is operating an Adult Store, which is classified in the zoning regulations as an Adult Entertainment Business. Such a business can only be located in an M.H. Zone. BCZR Section 4B-102. This portion of the Citation will be enforced. The County did not present specific evidence of this violation prior to December 18, 2009.

U. The County's Citation proposes a civil penalty of \$616,800, calculated by assessing the period of violation from July 12, 2001 to the Citation's date of December 21, 2009. While the County has proved that the zoning violation existed throughout this period, as Respondent has been improperly operating an Adult Movie Theater in a B.L. Zone, the County did not issue a citation to Respondent during this period. The County stated during this Hearing that notices were not issued due to ongoing litigation brought by Respondent, who was challenging the County's ordinances. Review of the file shows that Respondent voluntarily dismissed its complaint without prejudice on May 8, 2006. The potential civil penalty if the violation period is marked back to that date would exceed \$260,000.00. Review of the file and relevant cases shows that Respondent's claim under Article 40 of the Maryland

Declaration of Rights was clearly resolved by the Maryland Court of Special Appeals in April 2007. See 104 West Washington Street II Corp. v. City of Hagerstown, 173 Md. App. 553, 567, 920 A.2d 482, 489 (2007). The potential civil penalty if the violation period is marked back to that date would exceed \$190,000. However, because the County did not take renewed enforcement action even in 2007, it would be unreasonable to impose such a large penalty, and a smaller penalty of \$50,000.00 (fifty thousand dollars) will be imposed. A civil penalty of \$800.00 (eight hundred dollars) will also be imposed for the separate zoning violation of improperly operating an Adult Store in a B.L. Zone. Because compliance is the goal of code enforcement, Respondent will be given the opportunity to correct the zoning violations and obtain a reduced penalty. Because Respondent has deliberately and flagrantly violated the zoning regulations over an extended period of time, to the clear detriment of the surrounding community, compliance confirmed by inspections during the next twelve months will be required to obtain the reduced civil penalty.

V. Review of the departmental file shows that Respondent has never obtained a Use and Occupancy Permit for operation of a retail store, or for any of the activity and uses currently occurring at this property. The last recorded permit for this property was issued on January 17, 1996 for use and occupancy of this structure by a daycare facility with 12 children, 3 employees, and 6 parking spaces. According to the permit application for change of use to day care facility, the previous use of the property was "office." Respondent obtained a county Building Permit on October 17, 2007 for "interior alterations to existing retail space," but apparently did not apply for or obtain a Use and Occupancy permit for retail use or for the other uses in effect in the property. Respondent's change of use of the property without obtaining a new Use and Occupancy Permit violates County law. The County Building Code requires that "Any owner or authorized agent who intends to ... change the occupancy of a building or structure ... shall first make application to the building official and obtain the required permit." Building Code of Baltimore County, ICC International Building Code 2006, Section 105.1. This requirement is in place to ensure compliance with applicable building and fire safety codes. For purposes of analyzing the applicable building and safety requirements, a day care use is in Group I or in Group E. A Retail Store is classified as "Mercantile" and is in Group M. An Adult Movie Theater is an assembly use, and would likely be in Assembly Group A. Each of these occupancy groups has different requirements for building structure, exits, and other building codes that have been enacted "to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and other hazards attributed to the built environment and to provide safety to fire

fighters and emergency responders during emergency operations.” ICC International Building Code, op. cit., Section 101.3 (Intent); see id., Chapter 3 (Use and Occupancy Classifications).

W. Because compliance is the goal of code enforcement, this Final Order will impose “[r]easonable conditions as to the time and manner of correction,” in addition to imposing a civil penalty. See BCC Section 3-6-207. Because of the clear violations of the zoning regulations and the building code, this Order will refer this case to the County Building Engineer with a recommendation that the Use and Occupancy certificate for this property be revoked, and that Respondent be required to apply for and receive a certificate for Change of Occupancy before allowing this building to be used or accessed by the public, with all permit requirements confirmed by inspection, pursuant to Building Code of Baltimore County, ICC International Building Code 2006, Section 110.4 (Revocation) (“The building official is authorized to, in writing, suspend or revoke a certificate of occupancy or completion issued under the provisions of this code ... where it is determined that the building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this code.”) and pursuant to Building Code of Baltimore County, ICC International Building Code 2006, Section 105.4 (Validity of permit) (“The building official is also authorized to prevent occupancy or use of a structure where in violation of this code or of any other ordinances of this jurisdiction.”).

IT IS ORDERED by the Code Enforcement Hearing Officer that a civil penalty be imposed in the amount of \$50,800.00 (fifty thousand eight hundred dollars), and that \$10,800.00 (ten thousand eight hundred dollars) of this civil penalty shall be billed to Respondent effective immediately.

IT IS FURTHER ORDERED that the \$50,800.00 (fifty thousand eight hundred dollars) civil penalty will be REDUCED by \$40,000.00 (forty thousand dollars) if re-inspections between March 31, 2010 and March 31, 2011 find the zoning violations corrected, with neither an Adult Movie Theater nor an Adult Store being operated on this property. If the violations are not corrected, the remaining \$40,000.00 (forty thousand dollars) of the civil penalty shall be billed to Respondent.

IT IS FURTHER ORDERED that this case be referred to the Baltimore County Building Engineer with a recommendation that the Use and Occupancy Permit for this property should be REVOKED, and that the building should be ordered closed to the public until such time as a new Use and Occupancy Permit for a lawful and permitted use is issued by Baltimore County, with all permit requirements confirmed by inspection.

IT IS FURTHER ORDERED that if not paid within thirty days of billing, the civil penalty as authorized above shall be imposed as a lien upon the property.

IT IS FURTHER ORDERED that the County inspect the property to determine whether the violations have been corrected.

ORDERED this 24th day of March 2010

Signed: ORIGINAL SIGNED
Margaret Z. Ferguson
Baltimore County Hearing Officer

NOTICE TO RESPONDENT: The Respondent is advised that (1) pursuant to §3-6-206(g)(2) of the Baltimore County Code, the Respondent may make written application to the Director of the Department of Permits & Development Management within 10 days to modify or amend this order and (2) pursuant to §3-6-301(a), Baltimore County Code, the Respondent may appeal this order to the Baltimore County Board of Appeals within fifteen (15) days from the date of this order; any such appeal requires the filing of a petition setting forth the grounds for appeal, payment of a filing fee of \$150 and the posting of security to satisfy the penalty assessed.